Supreme Court, U. S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-787

EDWARD F. KAVANAGH, HUSTON T. ADAMS
and ROBERT M. ABERNETHY,
Appellants,

v.

LONDON GROVE TOWNSHIP, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
No. 482 JANUARY TERM 1978.

JURISDICTIONAL STATEMENT
MOTION TO DISMISS OR AFFIRM

A. THOMAS PARKE, III
WOOD PARKE BARNES
& BYRNE
Attorneys for London Grove Township
126 West Miner Street
West Chester, Pennsylvania 19380
(215) 696-0873

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, EASTERN PENNSYLVANIA REPRESENTATIVE
SUITE E1111 PARK TOWNE EAST, 2200 BENJAMIN FRANKLIN PKWY.
PHILADELPHIA, PENNSYLVANIA 19130
PHONE: (215) 568-7783

INDEX.

	Page
Motion to Dismiss or Affirm	1
Affidavit of Service	4
Exhibit "A"—Statement of Questions Involved	5

CASES CITED.

Arlington County Board v. Richards, 434 U.S. 5, 54 L. Ed. 2d 4, 98 S. Ct. 24 (1977)	2
Arlington Heights v. Metro. Housing Corporation, 429 U.S. 252, 50 L. Ed. 450, 97 S. Ct. 555 (1977)	3
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	2
Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974)	3

STATUTE.

Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended; 53 P.S. § 10101, *et seq.*	3

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

EDWARD F. KAVANAGH, HUSTON T. ADAMS and
ROBERT M. ABERNETHY,

Appellants,

v.

LONDON GROVE TOWNSHIP, *et al.*,

Appellees.

Appeal From the Supreme Court of Pennsylvania
No. 482 January Term 1978

JURISDICTIONAL STATEMENT

Motion to Dismiss or Affirm

Comes now appellee in the above-captioned matter, London Grove Township, and moves this Honorable Court either to dismiss the appeal of Messrs. Kavanagh, *et al.*, or in the alternative, to affirm the judgments of the Courts below, for the following reasons:

1. *Appellant failed to preserve for appeal its second argument, to wit: that there are alternate means, less constitutionally defective, of accomplishing the same goals.* At-

tached hereto as Exhibit "A" is the statement of the questions presented in the case taken from appellant's brief in the Supreme Court of Pennsylvania. These were the issues presented below, and they do not encompass the second argument.

2. *Appellant failed to preserve its third argument, to wit: excessive governmental control, in the form in which it is now presented.* In the Courts below, appellant argued against the ordinance because of claimed state pre-emption (Exhibit A, question 2) or in terms of proper zoning objectives (question 4). Governmental control as a federal constitutional issue was not presented as a question below.

3. *It is not a "federal question" that alternative methods exist for accomplishing the same goal.* (Argument No. 2). This argument is relevant only if the methods chosen are constitutionally deficient. That is the real issue, and it is appellee's contention that the means chosen by London Grove Township to preserve the integrity of its highest residential district (R-1) rationally promote legitimate objectives: see *Arlington County Board v. Richards*, 434 U.S. 5, 54 L. Ed. 2d 4, 98 S. Ct. 24 (1977).

4. *A right to interstate travel and commerce is not involved.* Appellant cites *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a case which involved state prohibition of out-of-state rubbish. However, there, there is no such distinction here. This case deals with municipal versus private commercial uses.

5. *The distinction between municipal and private commercial uses does not present a substantial federal question.* (Appellant's argument No. 1):

a. *All* zoning involves distinctions between types of uses. The basic state legislation here (The Pennsylvania

Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended; 53 P.S. § 10101, *et seq.*, in § 605, under the heading "Classifications", authorizes municipalities to regulate and restrict uses near "public buildings and public grounds". Municipal uses are almost universally put in different classifications from commercial uses, although there may be points of similarity between the two, *e.g.* office buildings. There may be distinctions which are so egregious as to invite the Court's attention; this is not one of them.

b. All three levels of courts which have considered this matter have affirmed the decision of the Township Board of Supervisors. Thus, there is no judicial conflict.

c. There is no evidence of discriminatory intent, as was presented in *Arlington Heights v. Metro. Housing Corporation*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977), so as to indicate a violation of the equal protection clause.

d. No fundamental rights, such as the right to travel, lack of due process, voting, privacy, assemblage, etc., are involved: *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

For the foregoing reasons, appellee asks either that the appeal be dismissed, or that the decision of the Courts below be affirmed.

Respectfully submitted,

WOOD PARKE BARNES & BYRNE,
A. THOMAS PARKE, III,
Attorneys for London Grove Township.

Affidavit of Service

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. .....

EDWARD F. KAVANAGH, HUSTON T. ADAMS and ROBERT M. ABERNETHY,

Appellants,

vs.

LONDON GROVE TOWNSHIP,

Appellee.

I hereby certify that on this seventh day of December, 1979, one copy of this Brief was served, by first class mail, postage prepaid on the following attorneys:

Robert W. Lentz, Esquire
30 Darby Road
Paoli, PA 19301

John F. Stoviak, Esquire
2600 The Fidelity Building
Philadelphia, PA 19109

WOOD PARKE BARNES & BYRNE,
A. THOMAS PARKE, III,
126 West Miner Street,
West Chester, PA 19380.

EXHIBIT "A"

Statement of Questions Involved

1. Is a zoning ordinance valid and constitutional when it prohibits private enterprise ownership and operation of a Department of Environmental Resources permitted sanitary landfill, a legitimate and vitally necessary business activity; but permits the same, at least in theory only by a municipality or a municipal authority? Affirmed.

2. Is a zoning ordinance which seeks to prohibit, regulate or control sanitary landfills beyond that of geographical locations within zoning districts invalid because its subject matter (i.e. the regulation of sanitary landfills) has been pre-empted by state legislature and regulation on the same subject? Negatived.

3. Is a second class township zoning ordinance invalid and in violation of *the second class township code* because it is inconsistent with or contrary to legislative policy, permits and/or rules, regulations, standards, procedures and plans of an instrumentality of the Commonwealth of Pennsylvania, viz.: Pennsylvania Department of Environmental Resources? Negatived.

4. May a township under the guise of a zoning ordinance prohibit a legitimate and necessary business activity within its borders by restricting said activity to municipalities or municipal authorities (which, in fact, do not provide such activity); and, is such prohibition violative of the *Pennsylvania Municipalities Planning Code* as being designed to achieve an improper zoning objective and purpose (viz.: the classification and restriction of a particular class of landowner, rather than the classification and restriction of structures and land uses)? Affirmed.